Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance	)	WT Docket No. 08-165

COMMENTS OF THE TOWN OF ALTON, NEW HAMPSHIRE:

These Comments are filed by the Town of Alton, New Hampshire, by and through its attorneys, Donahue, Tucker & Ciandella, PLLC, to urge the Commission to deny the Petition filed by CTIA. As noted below, CTIA's Petition is without merit and without basis in law or fact. The Town of Alton, New Hampshire also joins in the Comments filed by the National Association of Telecommunications Officers and Advisors ("NATOA") in response to CTIA's Petition.

I. Telecommunications Act's Balance in Deferring to Local Zoning is Working, As Shown in Alton, New Hampshire

To assist the Commission in its evaluation of CTIA's Petition, below are details specific to the personal wireless services facilities siting process and the recent experiences of the Town of Alton, New Hampshire, with application for such facilities.

The Town of Alton, New Hampshire was served with the Petition of CTIA in this matter on September 5, 2008, almost two months after the Petition was filed with the Commission, on July 11, 2008. Although not mentioned by name, the Town's Personal Wireless Services Facilities Ordinance ("Ordinance") is apparently referenced at page 36 of the Petition, as limiting wireless facilities to a height of ten (10) feet above average tree canopy (as defined in the Ordinance) which "could effectively preclude the [personal wireless services] provider from serving the entire community, thus forcing the wireless carrier to seek a variance; …."[1] Nothing more is given in the Petition with regard to the Ordinance or the experiences of the Town in reviewing, granting and denying applications for locations of personal wireless service facilities in this Town. As it happens, the experience of this Town is a fine example of how the current statutory scheme is working, not of how it is broken.

[1] CTIA relies throughout its petition on the 3-Judge panel decision of the 9th Cir. in Sprint Telephony PCS,L.P. v. County of San Diego, 490 F. 3d. 700 (9th Cir. 2007). However the full 9th Circuit Court of Appeals granted rehearing en banc, at 527 F.3d. 721 (9th Cir. 2008). In a decision issued September 11, 2008, the full Court reversed that decision. The Court reexamined its earlier precedent interpreting § 253, City of Auburn v. Qwest Corp., 260 F.3d. 1160 (9th Cir. 2001), which held that the City of Auburn's wireless ordinance violated § 253(a), because it *may* … have the effect of prohibiting" the provision of wireless services. However, the Court noted that this reading of the statute was actually erroneous, and that the clear language of the statute required that there be actual effective prohibition, not just the possibility of effective prohibition, in order for § 253(a) to operate to preempt a local ordinance. Sprint Telephony PCS, L.P. v. County of San Diego, _____ F.3d. _____ (9th Cir. Sept. 11, 2008 Slip. Op. at p.12713).

The Court also reviewed the legislative history of the 1996 Telecommunications Act, noting that the House and Senate conferees on the bill considered the House version of the bill, which would have pre-empted local zoning, and "decided instead to preserve the authority of state and local governments over zoning and land use matters except in the limited circumstances set forth in the conference agreement." Id. at 12708 (citations and internal quotations omitted). Finally, the Court noted that Sprint could not demonstrate that "no set of circumstances exists under which the [Ordinance] would be valid." Id. at 12715 (internal citations and quotations omitted). Thus, two of the main precedents supporting CTIA's petition in this matter has been eliminated.

What the Petition fails to reveal is telling. The following is a summary of materials prepared by the Town of Alton in response to an appeal of the denial of one application for a personal wireless services facility near Lake Winnipesaukee. The case is now in federal court in the District of New Hampshire, awaiting oral argument on two motions for summary judgment. The Town respectfully submits a copy of its Motion for Summary Judgment on Count II of the Complaint (claiming the denial effectively prohibited personal wireless service in Alton), the Memorandum in Support thereof, and the exhibits to that Memorandum, as an attachment to these comments and incorporates them herein (hereinafter, "Attachment").

A. Alton Granted One Application and Denied One Application by the Same Personal Wireless Facilities Company

The most important fact omitted from the Petition is that the Town received two (2) applications for 120-foot personal wireless services facilities in the Town, at the same time, by the same applicant: a real estate company in the business of erecting personal wireless facilities towers, but not itself a wireless carrier. After reviewing both applications carefully, the Town granted one application, because it met all the criteria for a variance of the zoning Ordinance under New Hampshire law, and denied one application because it met none of the criteria. "To obtain a variance, an applicant must show that: (1) granting the variance will not be contrary to the public interest; (2) special conditions exist such that a literal enforcement of the provisions of the ordinance will result in unnecessary hardship; (3) granting the variance is consistent with the spirit

of the ordinance; (4) by granting the variance substantial justice is done; and (5) granting the variance does not diminish the value of surrounding properties. See *Vigeant v. Town of Hudson*, 151 N.H. 747, 751, 867 A.2d 459 (2005); see also [N.H.] RSA 674:33, I(b) (Supp. 2004)." *Chester Rod and Gun Club v. Town of Chester,* 152 N.H. 577, 580 (2005).

As noted above, it is an appropriate exercise of the Town's delegated powers from the State to protect "the health, safety, morals and general welfare of the community" through zoning. *Carlson's Chrysler v. City of Concord,* 156 N.H. at 404. It is also recognized that considerations of aesthetics and other criteria are appropriate for inclusion in zoning ordinance requirements. Of the two applications to Alton for 120-foot towers, one was in a location where it was properly screened from view, where it would not diminish the value of surrounding properties and it could not be seen clearly from Lake Winnipesaukee, an foundational element of the Town's Master Plan due to the importance of revenues from tourism to the Town's economy. By contrast, the application that is the subject of the current appeal met none of those requirements, demonstrating its inappropriateness for that location, at that height. Local zoning worked in this case, and local authorities charged with administering the Ordinance applied it even-handedly. By omitting the permitted application from the description in the Petition, CTIA suggests that the Town is hostile to personal wireless facilities and that the requirements of its Ordinance and the variance process are impossible to meet. This is not the case, as shown by the fact that the Town granted the application for one tower,

which is now constructed and the wireless services providers located thereon are currently providing personal wireless services in Alton.

B. Alton's Ordinance Permits Wireless Facilities Throughout the Town, Subject to Limitations on Height and Visual Appearance

In 2005, while the application at issue in the current federal case was pending before the Alton Zoning Board of Adjustment, the Town Planning Board began review of the existing wireless ordinance and concluded that it was too restrictive, as it permitted personal wireless service facilities only in certain overlay zones, which did not coincide with the existing gaps in personal wireless service coverage in the Town. After a series of public hearings, the current Ordinance was proposed as a warrant article for Town Meeting. In place of the old overlay districts, the current Ordinance permits personal wireless service facilities in virtually all areas of the Town, subject to certain requirements to minimize visual impact, including the height limitation of 10 feet above average tree canopy. The goal was to permit more personal wireless service facilities to be constructed, to improve personal wireless service in the Town, but to reduce the visual intrusiveness of the facilities by requiring co-location and/or lower towers. It was an effort explicitly to meet the requirements of § 332(c)(7) while also enhancing the opportunities for wireless service in the Town. Approximately 75% of the voters voted in favor of the new Ordinance at the March 2006 Town Meeting. (Attachment, pp. 8-12).

C. The Evidence Before the Town and the Federal Court Shows That Service Could Be Provided With Lower Towers

As shown in the expert report filed by the Town in support of its motion for summary judgment on the federal case involving Alton, lower towers and potentially horizontal co-location of facilities could enable the applicant to provide service at lower heights. It is significant that the applicant insisted that up to five providers of personal wireless services could co-locate vertically on the proposed tower, but that the applicant had only two providers at the time its application was pending before the Town. In spite of requests, the applicant refused to reduce the height requested for the tower. (Attachment, pp. 13-19, 22-31 and 34-59).

D. Lower Profits Do Not Result In Violations of the Telecommunications Act

Although the evidence shows that the applicant in Alton could have provided personal wireless services at lower heights than the height proposed, it was not interested. The reason for this lack of interest is revealed in a letter from the applicant's counsel to his clients, disclosed by the applicant during discovery: lower and possibly more numerous towers would cut into the applicant's, the tower company's, profits. A copy of this letter is attached as an exhibit to the Motion for Summary Judgment and Memorandum of Law in Support Thereof, filed herewith and incorporated herein. In it, counsel for the applicant acknowledges that the current Ordinance would withstand a legal challenge under the Telecommunications Act. (Attachment, pp. 61-63).

Neither § 332(c)(7) protects such profit motives nor does § 253. The Commission should reject this attempt to override the clear enactments of Congress and of local governments in places such as Alton, New Hampshire, where local governments and local boards are conducting the people's business, enacting local zoning ordinances and balancing applications for land use and personal wireless facilities -- granting the good ones and denying the bad, with the insight that only local citizens can have. This is the balance Congress created in enacting the Telecommunications Act of 1996.

II. The Specific Statutory Language of 47 U.S.C. Section 332(c)(7) Preserving Local Zoning Controls Over the General Language of 47 U.S.C. Section 253 Pertaining to Preemption of Local Regulation

Section 253 of Title 47 of the United States Code does not apply to local land use decisions on wireless tower locations. Rather, 47 U.S.C. § 332(c)(7)(B) governs personal wireless service facilities locations to the exclusion of § 253.

The heading in the relevant section of the Telecommunications Act of 1996 is entitled "(7) Preservation of local zoning authority." This statutory section explicitly contemplates the enactment of local land use laws and the application of those laws to personal wireless service facilities applications in the first instance, subject to review by the federal or state courts.

Section 332(c)(7)(A) states:

"(A) General authority: Except as provided in this paragraph, *nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.*" (Emphasis supplied).

The chapter referenced in the quotation above is Chapter 5 of U.S.C. Title 47, entitled "Wire or Radio Communications." This is the same chapter in which § 253 is found, indicating that Congress intended that the limitations on local zoning and land use decisions on placement of personal wireless service facilities found in § 332(c)(7) be the only limitations on such decisions in Chapter 5 of Title 47.

Section 332(c)(7) Subparagraph (B)(i) specifically provides:

The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof–

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

Section 253 likewise provides:

(a) In general,

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

However, the next section of that statute specifically permits state regulatory requirements such as zoning so long as they are competitively neutral and comply with 47 U.S.C. § 254. Specifically, § 253 goes on to provide:

(b) State regulatory authority

Nothing in the section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with § 254 of this title, requirements necessary to … protect the public safety and welfare ….

It is well established that states may enable local zoning regulation, as a way for the states to protect the public safety and welfare. In New Hampshire, for example, local zoning is well understood to perform this function, pursuant to power delegated to municipalities by the state.

"The State zoning enabling act grants municipalities broad authority to pass zoning ordinances for the health, safety, morals and general welfare of the community." "In enacting a zoning regulation, a town may consider the knowledge of town selectmen and planning board members concerning such factors as traffic conditions and surrounding uses resulting from their familiarity with the area involved." "Furthermore, a municipality may exercise its zoning power solely to advance aesthetic values because the preservation or enhancement of the visual environment may promote the general welfare."

Carlson's Chrysler v. City of Concord, 156 N.H. 399, 404 (2007) (quoting *Taylor v. Town of Plaistow*, 152 N.H. 142, 145 (2005). Thus, § 253 also protects local zoning regulation, consistent with the requirements of § 253(b) and § 254.

While the language in § 332(c)(7)(i)(II) prohibits regulation by states, local governments or their instrumentalities that would "prohibit or have the effect of prohibiting" personal wireless services in particular, the parallel language in § 253 addresses state or local regulations that "prohibit or have the effect of prohibiting"

telecommunications service generally. This is a situation in which the specific statutory language controls over the general, in particular when § 332(c)(7)(A) permits a challenge to decisions on locations of personal wireless service facilities *only* pursuant to the limitations in the subparagraph immediately following: (B). Congress does not enact redundant code provisions.

Further, the Supreme Court's ruling in Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384-385 (1992), establishes that specific code sections govern, rather than general code sections. Section 332(c)(7) is very specific as to the remedies and procedures to be followed with respect to personal wireless service facility applications, preserving local zoning and vesting our state and federal courts with jurisdiction to adjudicate appeals of decisions of local land use boards denying such applications.

Section 332 (c)(7)(B)(v) provides:

> Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days of such action or failure to act, commence an action in any court of competent jurisdiction.

In addition, that court must hear and decide the suit on an expedited basis. Further, any person adversely affected by any local government action or failure to act that is inconsistent with the limitations in § 332(c)(7)(B)(iv) (pertaining to denials of applications based on radio frequency emissions, where the applications show compliance with FCC regulations on such emissions) may petition the *Commission* for relief. The specificity of these remedies, providing jurisdiction in the courts for some

matters and in the Commission for others, shows that § 332(c)(7)(B) applies to local zoning of personal wireless services facilities to the exclusion of § 253.

In the face of the explicit protections provided to local zoning in both § 253 and § 332(c)(7), it would be contrary to those statutes, and to the overall statutory scheme in Chapter 5 of Title 47 of U.S.C., for the Commission to take it upon itself to preempt local zoning in the first instance, rather than requiring applicants for personal wireless service facilities to follow that statutory scheme.

III. Conclusion

In conclusion, the Commission does not have the authority to issue the declaratory ruling requested by CTIA because it would be contrary to Congress's intentions. Further, the current process for addressing land use applications ensures that the rights of citizens in our community to govern themselves and ensure the appropriate development of the community are properly balanced with the interests of applicants for personal wireless services facilities. As shown in particular in the Town of Alton, New Hampshire, the current system works well, and there is no evidence to suggest that the Commission should grant a special waiver of state and local law to the personal wireless services facilities industry. Any perceived difficulties experienced by wireless providers can be and are adequately addressed through the legislative process in each individual community and the judicial process in the courts. Federal agency intrusion is neither warranted nor authorized.

Respectfully submitted,
TOWN OF ALTON
By its attorneys,
DONAHUE, TUCKER & CIANDELLA, PLLC

DATED: September 29, 2008 By: 

Katherine B. Miller
Robert D. Ciandella
225 Water Street
Exeter, NH 03833
(603) 778-0686

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ATTACHMENTS TO TOWN OF ALTON'S COMMENTS

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

INDUSTRIAL COMMUNICATIONS AND ELECTRONICS, INC. ET AL Plaintiff, v. TOWN OF ALTON, NH Defendant and David Slade and Marilyn Slade Intervenor-Defendants	Case No. 1:07-cv-00082-JL

DEFENDANT TOWN OF ALTON'S CROSS MOTION FOR SUMMARY JUDGMENT ON EFFECTIVE PROHIBITION CLAIM

NOW COMES, the Defendant, Town of Alton, New Hampshire (the "Town"), by and through its attorneys, Donahue, Tucker & Ciandella, PLLC, and moves this Court for summary judgment on Count II of the Complaint of Plaintiffs', Industrial Communications and Electronics, Inc. ("ICE"), RCC Atlantic, Inc. d/b/a Unicel ("Unicel"), and U.S.C.O.C. of New Hampshire, RSA #2, Inc. d/b/a U.S. Cellular ("U.S. Cellular") (collectively "Plaintiffs" or "Applicants") in favor of the Town, and the Intervenor-Defendants, David and Marilyn Slade, and against the Plaintiffs, and in support thereof states as follows:

1. This case concerns the denial of an area variance to construct a 120 foot telecommunications tower in the Town of Alton, New Hampshire, near Lake Winnipesaukee, pursuant to § 704 of the Telecommunications Act of 1996, codified at 47 U.S.C. § 332(c)(7)(B)(i)(II) (the "TCA").

2. Plaintiffs applied to erect two towers in the Town of Alton, each 120 feet high, on two separate parcels to cover alleged gaps in coverage.

3. The ZBA granted the variance for the parcel located at the Robert's Knoll Campground site on Wolfeboro Highway ("Wolfeboro Highway site"), finding that it met the criteria for a variance under New Hampshire law, and was not visually intrusive.

4. The ZBA denied Plaintiffs' application to erect a tower at 486 Eastside Drive, ("Eastside Drive site"), the subject of this case.

5. While Plaintiffs' applications were pending, the Town amended its zoning ordinance, which had previously permitted Personal Wireless Service Facilities ("PWSF" or "PWSFs") only in overlay districts, and had limited the height more strictly. The new ordinance, which went into effect March 2006, permitted PWSFs in virtually all districts, so long as they were adequately disguised and no higher than 10 feet above the average tree canopy. In this

matter, this meant that the Plaintiffs would need to receive a variance if they wished to construct a tower greater than 71 feet.

6. At the East Side Drive site, Plaintiffs sought to construct a 120 foot tower, approximately 50 feet higher than that permitted by the new Ordinance.

7. The Zoning Board of Adjustment ("ZBA") for the Town found that the application met none of the five criteria for a variance under New Hampshire law. In particular, the ZBA members found that the tower would have been highly visible from many surrounding properties and the lake, would have diminished the value of properties in the Town, would have marred the landscape which is of vital economic importance to the Town, given its status as a tourist destination, would have lowered property values, was not consistent with the spirit of the ordinance, which was to provide greater cell service but with less obtrusive towers, and did not create a hardship as there were other alternatives available to the Plaintiffs in the way of shorter towers, or less height on this particular tower to serve the wireless services providers wishing to occupy it.

8. ICE had agreements with Unicel and U.S. Cellular, two providers of wireless telecommunications services, to

locate on the tower. However, ICE's proposed tower would be able to hold at least 5 wireless service providers.

9. According to ICE's application to the Town, antennas could be located at 120 feet, 110 feet, 100 feet, 90 feet, and at 80 feet. Plaintiffs never offered to reduce the height of the tower because a lower tower did not meet ICE's business objectives even though a shorter tower would close the allege gap in service.

10. Plaintiffs cannot claim that the Town was hostile to its applications, in general, that further efforts to erect a tower would be fruitless, or that the requirements of the ordinance were impossible to meet, as the sister application filed at the same time for the Wolfeboro Highway site was approved by the Town.

11. Under the TCA, Towns are allowed to make land use decisions based on their zoning ordinances and state law, if the effect does not prohibit PWSFs in the town. Such is the case here. The Town made reasonable choices in the development of its zoning Ordinance, choosing to prefer lower towers (even if that resulted in more towers), and in the application of that zoning ordinance by the ZBA.

12. The Town's expert submitted a report documenting other options for providing wireless services at lower heights. Plaintiffs' insistence on a PWSF of 120 feet in height was

due to the desire to co-locate additional wireless service providers on the tower, leading to greater rental revenue.

13. In addition to the certified record and exhibits previously submitted in conjunction with the first motion for summary judgment on the substantial evidence claim, the Town submits herewith, and incorporates herein by reference, a Memorandum of Law in support of its Motion for Summary Judgment, and two exhibits: of its expert, David Maxson, and a document provided by Plaintiffs during discovery.

WHEREFORE, the Town respectfully requests that an Order be entered:

A. Granting summary judgment in favor of the Town on Count II of the Plaintiff's Complaint; and

B. Granting such other and further relief as the Court may deem just and proper.

Respectfully submitted,
TOWN OF ALTON, NEW HAMPSHIRE
By its attorneys,

DATED: May 19, 2008

/s/ Robert M. Derosier
Robert M. Derosier, NHB No. 9979
Robert D. Ciandella, NHB No. 2817
DONAHUE, TUCKER & CIANDELLA, PLLC
225 Water Street
Exeter, NH 03833
(603) 778-0686

CERTIFICATE OF SERVICE

I hereby certify that on 19 May 2008 a true copy of the above document will be sent to counsel of record via the Court's Electronic Case Filing system.

/s/ Robert M. Derosier
Robert M. Derosier, NHB No. 9979

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

INDUSTRIAL COMMUNICATIONS AND ELECTRONICS, INC. ET AL Plaintiff, v. TOWN OF ALTON, NH Defendant and David Slade and Marilyn Slade Intervenor-Defendants	)	Case No. 1:07-cv-00082-JL

MEMORANDUM OF LAW

NOW COMES, the Defendant, Town of Alton, New Hampshire, ("Town"), by and through its attorneys, Donahue, Tucker & Ciandella, PLLC, and moves this Court for summary judgment on Count II of the Complaint of Plaintiffs' Industrial Communications and Electronics, Inc. ("ICE"), RCC Atlantic, Inc. d/b/a Unicel ("Unicel"), and U.S.C.O.C. of New Hampshire, RSA #2, Inc. d/b/a U.S. Cellular ("U.S. Cellular") (collectively "Plaintiffs" or "Applicants") in favor of the Town, and the Intervenors-Defendants, David and Marilyn Slade (collectively "the Slades"), and against the Plaintiffs, and in support thereof states as follows:

Background:

On or about September 2005, ICE filed zoning applications for two ground mounted personal wireless service facilities, ("PWSFs") with the Alton Zoning Board of Adjustment ("ZBA"). The first, and the subject of this appeal, to be located at 486 East Side Drive, Tax Map No. 14, Lot No. 21, (R. 37 - 50) and the second to be located at 1439 Wolfeboro Highway, Tax Map 19, Lot No. 8-2. (R. 22 - 36).[1]

ICE purchased the East Side Drive property, a 28.4 acre site, by deed dated 19 May 2005. (R. 141-142). The parcel is located in the Town's Lakeshore Residential zoning district. (R. 37). On its parcel, ICE proposed constructing a 120 foot monopole. (R. 38 - 39). According to ICE's application, the monopole would structurally accommodate "at least" 5 wireless service providers for service in the Town. (R. 39). The lowest microwave antennas were to be located at 75 feet. (R. 39). Unicel proposed mounting its antennas at the height of 120 feet. (R. 39). U.S. Cellular proposed mounting its antennas at the height of 110 feet. ICE represented that future antennas could be installed at the heights of 100, 90, and 80 feet. (R. 39).

During the review of ICE's application, the Town amended its PWSFs ordinance at Town Meeting on 14 March 2006. Over 75%

[1] The ZBA approved a 120 foot tower at the 1439 Wolfeboro Highway site also known as the Robert's Knoll Campground site. (R. 1782-1784)

of the voters voted in favor of adopting a new Personal Wireless Service Facilities Zoning Ordinance, ("Ordinance"). ICE requested that it be permitted to amend its applications, which had been initiated under the previous ordinance, and to transfer the administrative record on file with the ZBA to the amended application. The Town agreed to ICE's request. (R. 871).

The Ordinance has two goals. The first is to improve wireless coverage by permitting more towers. The second is to reduce the visual impact of PWSFs on views in the Town. (R. 2005 - 2006). As planning board member, Mr. Sherwood noted, the Ordinance reconciles these goals by encouraging more, shorter towers:

> The existing ordinance allows for maybe some broad coverage but there are some gaps in Town. Each one of these facilities can only support a certain number of phone calls capacity-wise. As time goes on you will see lower towers and that is [to] support the capacity. What is there now can't support the Town's future needs as more and more people use these devices. I think this will allow for long-term development of better services and maybe get rid of the eyesores on the hilltops. They will still be able to build a tower if there is no other solution but [there] are … constraints with it having to be below the trees and also the antenna can't extend more than 10 feet above the tree height, but there will be more of them.

(R. 608). Specifically, the Ordinance permits ground mounted PWSFs in virtually all zoning districts within the Town.

(Section 603.4.1). The exceptions are minor. Ground mounted PWSFs are prohibited in Mount Major State Park (Section 603.4:4.5.1) and within 50 feet of the shore of public waters (Section 603.4:4.5.2).

At the same time, however, the Ordinance seeks to minimize the visual impact of PWSFs: "It is the express purpose of this Ordinance to permit carriers to locate personal wireless service facilities . . . consistent with appropriate land use regulations that will ensure compatibility with the visual and environmental features of the Town." (Section 603.1). To do this, the Ordinance enables the Town "to regulate the placement, construction, and modification of [PWSFs] so as to eliminate or mitigate the visual impacts of [PWSFs]." (Section 603.1). One method for achieving minimal visual impact is co-location "both vertical and horizontal." (Section 603.1).

Minimizing the visual impact of PWSFs for Alton is a paramount concern for several reasons. First, Alton is a small rural community of approximately 5000 residents and a large PWSF looming over the skyline would be out of place in such an environment. As noted by the Town in denying this application:

> In this particular case, the Applicant was proposing to erect a tower on property overlooking the Town bay. It is in the Lake Shore Residential area which is the most strictly zoned property in Town.
>
> On the day of the balloon tests, the balloons

> in the Roberts Knoll area were visible from only limited areas, and so, that application was approved.[2] However, as noted by the ZBA members, the balloons at the subject site were visible from all but one location, and appeared to loom over the bay and lake viewing locations.

(R. 2168). Second, Alton borders extensively on Lake Winnipesaukee. Winnipesaukee is a foundational element of the Town's economy, which is built largely on tourism. (R. at 607). As noted by the Town in denying this application:

> The major and most important issue must be consideration of the impact on the viewshed . . . . A conspicuous tower could reduce the attractiveness of the community to a person and/or family that is trying to decide where to spend their vacation dollars.

(R. 2162).

To evaluate the visual intrusiveness of new ground mounted PWSFs, applicants must undergo site plan review and receive a building permit. (Section 603.5:D). As part of the site plan review process, applicants have the burden of proving that existing structures are not suitable for their needs. (Section 603.4:4.3). Further, an applicant must demonstrate that the PWSF's effect "has been minimized on the viewshed containing the facility, and that the facility will not visually dominate any viewshed in Town." (Section 603.4:4.1). In addition, the PWSFs

[2] Again this was the 120 foot PWSF submitted by ICE at the same time as the PWSF under appeal in this matter. The Town approved this 120 foot PWSF.

"shall be designed so as to be camouflaged to the greatest extent possible, including but not limited to: use of compatible building materials and colors, screening, landscaping, and placement within trees." (Section 603.4:4.4). Finally, the PWSF cannot "project higher than ten (10) feet above the average tree canopy height of the trees" in a defined area surrounding the PWSF. (Section 603.6:D). The Ordinance defines Average Tree Canopy Height to mean:

> The height of all trees surrounding a PWSF shall be measured from a base line extending outward from the point at which the base of the ground mount contacts the ground. This point shall be referred to as the contact point. The base line shall extend 360 degrees from this contact point parallel to the horizon and is independent from the slope of the surrounding ground.
>
> The average tree canopy height shall be determined by inventorying the height above the base line of all trees within an area that extends for a distance of fifty (50) feet outward from and 360 degrees surrounding the contact point along the base line from the base of the mount, security barrier, or designated clear area for access to equipment, whichever is greatest. The height that each tree extends above the base line within this area shall be measured and inventoried and the average height shall be calculated. Trees that will be removed for construction shall Not be used in this calculation.

(Section 603.3:3.3).

In this matter, the Town hired Peter Farrell, NH LF #85 of New England Forestry Consultants, Inc., to evaluate the forest

canopy at the East Side Drive parcel. (R. 1095). In his report dated 15 June 2006, Mr. Farrell stated that the goal of his evaluation was to obtain an average height of the canopy which would effectively provide a visual buffer to the proposed tower at the site. (R. 1095). Mr. Farrell began his survey at the center point of the proposed site. He then sampled trees within the "doughnut" created by two concentric circles of 70 feet and 120 feet. He determined that the average height of the canopy within these concentric circles was 61 feet. (R. 1095).

The Town then provided Mr. Farrell's report to Mr. Hutchins, the Town's Radio Frequency expert for the application process. After review, Mr. Hutchins issued a second report dated 19 June 2006. (R. 1150). In this report, Mr. Hutchins stated that "a 25-foot reduction in the applied-for 120 foot height results in structures that, in my opinion, better lend themselves to stealth (tree) design, such as a Verizon Wireless installation approved in White River Junction (VT) and shown at Appendix 1." (R. 1156). Mr. Hutchins reasoned that "[s]ince the tree canopy is not as high as originally determined; antenna heights can be correspondingly lowered." (R. 1161). He also stated that horizontal co-location could be used effectively to reduce tower height by building multiple, less obtrusive towers. (R. 1156).

To support his conclusion that a smaller (95 foot) tower would work, Mr. Hutchins also performed radio frequency propagation studies. These studies showed acceptable coverage from a 95 foot tower at the East Side Drive location. (R. 1159). Mr. Hutchins also opined that another site, Evans Hill, worked "well for cellular coverage and actually does a better job covering the lake and shore areas to its north." (R. 1161).

In a joint Planning Board/ZBA meeting, the Planning Board, in keeping with the requirements of the Ordinance, analyzed whether or not the Plaintiffs had complied with the requirement that they first seek existing locations and that the towers be as unobtrusive as possible, including the option for horizontal co-location of multiple smaller towers rather than single larger towers that would be more visually intrusive. For example, in discussing the options for co-location, the ZBA members and Mr. Hutchins discussed the possibilities of horizontal co-location of multiple towers. Mr. Hutchins confirmed that towers on the same parcel would need to be approximately 400 feet apart to prevent interference, although it may be possible to "engineer around" the interference problem. (R. 1503).

Planning Board members also discussed with Mr. Hutchins and with Mr. Reitter, the Town's consulting engineer, whether there were other locations that could be used for camouflaging lower towers in existing structures. Mr. Reitter noted that he had

only reviewed those locations submitted by the applicant, and the applicant had only considered those locations with regard to the earlier ordinance and a larger, 120 foot tower, and the applicant had found them unacceptable. Mr. Reitter noted that the applicant did not consider whether or not any of those locations would work as part of a network of lower towers to provide comprehensive coverage in the Town under the new ordinance. (R. 1504).

Mr. Reitter also noted that although Plaintiffs had sent letters to nine property owners, they had received no responses from them, and four others that had responded that they were interested in their property being used for a wireless facility, had been ruled out by the Plaintiffs. He noted that although Plaintiffs believed that those four sites were not feasible, it was not clear whether that decision on non-feasibility was under the new ordinance or the old one. (R. 1504).

At the end of that Planning Board meeting, the members voted on their findings as to whether or not Plaintiffs' applications for the East Side Drive site met any of the requirements under the new Ordinance. The Board voted unanimously that (1) the 120 feet height is outside the limits of the Ordinance for a ground-mounted wireless facility at East Side Drive; (2) that the tower would dominate the viewshed of Alton Bay, in violation of the Zoning Ordinance 603:4, 7.2 and

Section 335 of the Zoning Ordinance, designed to protect viewsheds and vistas; (3) that the Ordinance is in conformity with directives from the master plan and the future land use chapter of the master plan, page 19, action 10: the creation of specific telecom regulation, and aesthetically pleasing developments; (4) that the Plaintiffs had not investigated a multiple-unit network of four or five wireless facilities or more, as the Ordinance envisioned when it allowed unlimited locations in the Town; and (5) that the Plaintiffs had not made inquiry of possible site owners expressing the limitations that the Ordinance would require on the height and appearance of the tower. (R. 1535). These conclusions demonstrate the comprehensive set of options available to Plaintiffs pursuant to the new Ordinance, and their failure to entertain any of them.

At the meeting of the ZBA on 30 November 2006, the Board, concerned about ICE's request for an additional 50 feet in height above the height permitted by the Ordinance, asked about reducing the number of carriers on the tower to reduce the height and about horizontal co-location to allow additional carriers to serve the Town. (R. 1739 - 1743). Applicants rejected both of those suggestions.

At the ZBA hearing on 11 December 2006, the Planning Board Chair noted the lack of flexibility on Plaintiffs' part to consider shorter towers. Mr. Hoopes noted that additional

height above the tree canopy, 20 feet rather than 10 feet prescribed in the ordinance, would still be consistent with the spirit of that ordinance to reduce the impact of the towers on the views in the Town. "So again, I would accept a 20-foot height above the tree crown as established by the Town's forester, and we would want to avoid that 'lollipop' [tower] feature. We wanted the better coverage within Town without the ugly towers that would be visible." (R. 2003).

By notice of decision dated 11 December 2006, the ZBA denied ICE's application for an area variance. (R. 2050). The ZBA unanimously found that the application failed to satisfy any of the five criteria for an area variance under New Hampshire law.[3] (R. 2050). The Plaintiffs filed a motion for rehearing dated 5 January 2007. (R. 2069). The ZBA again reviewed the five criteria for granting a variance and the evidence submitted by the Plaintiffs, and the Board affirmed its decision that the Plaintiffs were not entitled to a variance for a 120 foot tower. (R. 2212).

Several of the Board's rationales for denying an area variance are pertinent to and undermine the Plaintiffs' claim of effective prohibition under the TCA. For example, the ZBA found

[3] The five legal criteria for an area variance, which were reviewed and addressed by the ZBA, are the following: Public interest, spirit of the ordinance, substantial justice, value of surrounding properties, and hardship.

that the Plaintiffs had failed to show that there were no other less intrusive methods for closing the alleged gap in coverage:

> It should be noted that with regard to this tower, the record demonstrates the applicant was determined to have this particular tower at this specific location and failed to demonstrate that the benefits sought could not be achieved by some other reasonably feasible method. Moreover, the Board obviously determined the ordinance permits a cell phone provider to establish service while staying within the requirements of the ordinance or by requesting a variance that stays within the harmony and spirit of the ordinance.

(R. 2217).

> The record also enabled the board to reasonably conclude the applicant failed to pursue reasonable technological alternatives such as a series of shorter towers or other technologies that would close cell phone coverage gaps.

(R. 2217). Similarly, the Board found that the applicant sought this height of 120 feet not to meet coverage demands but to maximize profits:

> The height of 120 feet AGL is only required to allow for co-location of six Wireless Communications Companies. A tower of lesser height would still be functional. Just not for the purpose of co-locating numerous companies on one tower.

(R. 2221).

> In this case one company could work reliably on a tower 10 feet above the

> tree canopy. The fact that this occurs in the Town of Wolfeboro was never disputed by the applicant. So the only reasonable conclusion as to why the applicant wants a tower of 120' feet AGL or approx. 60 feet above the tree canopy is to maximize the profit made from the tower. So then the hardship of the height restriction becomes a self-imposed one.

(R. 2222). Indeed, the Town was willing to entertain a lower tower which met the spirit of the Ordinance[4] but the Plaintiffs never presented that alternative to the Town:

> At no point in time did anyone from the ZBA state that they would no[t] entertain a tower of lower height at this location. So I did not feel that the applicant is correct in stating that by denying this variance request The Town of Alton is prohibiting Personal Wireless Communication coverage.

(R. 2225).

Standard of Review:

This memorandum of law addresses the issue of whether the Town effectively prohibited the provision of wireless services when the Town denied an area variance to construct a 120 foot PWSF on a 28.4 acre parcel owned by ICE located in the Lakeshore Residential zoning district, when the Town's regulations permit a tower of only 10 feet above average tree canopy, or 71 feet in

[4] Another pertinent consideration, as the Board noted, is that this parcel is located in the Lake Shore Residential area, "which is the most strictly zoned property in Town." (R. 2168).

this district, in violation of § 332(c)(7)(B)(i)(II) of the Telecommunications Act of 1996 ("TCA").

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In a non-jury case where the parties have filed cross-motions for summary judgment and the material facts are undisputed, the case is submitted and the court should determine the inferences to be drawn from the undisputed facts. See, Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 643 - 644 (1st Cir. 2000). In addition, the Court is to review a claim of effective prohibit de novo based on the record developed by the local land use authority and any other evidence submitted by the parties in support of their motions. See, Town of Amherst, N.H. v. Omnipoint Communications, 173 F.3d 9, 16 (1st Cir. 1999).

Effective Prohibition:

The TCA provides that "[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any state or local government or instrumentality thereof . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C.A. §332(c)(7)(B)(i)(II). "The rule in this Circuit is

that the TCA's anti-prohibition clause is not restricted to blanket bans on cell towers imposed by towns." Second Generation Properties, L.P. v. Town of Pelham, 313 F.3d 620, 629 (1st Cir. 2002) (citation omitted).[5] A denial of a single request to build a PWSF can constitute an effective prohibition of wireless service. See, Town of Amherst, N.H. v. Omnipoint Communications, 173 F.3d at 14.

There are two elements to a single denial claim. First, the Plaintiffs must establish that the proposed tower will fill a significant gap in wireless service. See, Nextel West Corp. v. Unity Township, 282 F.3d 257, 265 (3rd Cir. 2001). Mere "dead spots" defined by the Federal Communication Commission regulations as "small areas within a service area where the field strength is lower than the minimum level for reliable service," 47 C.F.R. §22.99, will not qualify as significant gaps in service. See, 360° Communications Co. v. Bd. of Supervisors of Albermarle County, 211 F.3d 79, 87 (4th Cir. 2000).

Second, the Plaintiffs must prove that their "existing application is the only feasible plan; in that case, denial of the Plaintiffs' application might amount to prohibiting personal wireless service.'" Id. at 630; (quoting Town of Amherst, N.H. v. Omnipoint Communications, 173 F.3d at 14). Even if an

[5] There can be no claim that Alton imposes a blanket ban on cell towers. The Town's Ordinance allows PWSFs in all districts and it granted a variance permitting a 120 foot tower for the Robert's Knoll site.

individual permit denial leaves a significant gap, the denial will not amount to an effective prohibition unless the gap cannot be filled by other means. "[T]he burden for the carrier invoking the [effective prohibition] provision is a heavy one: to show from language or activities not just that this application has been rejected but that further reasonable efforts are so likely to be fruitless that it is a waste of time to even try." Town of Amherst, N.H. v. Omnipoint Communications, 173 F.3d at 14. (Emphasis in original).

The Plaintiffs have not met their burden. Accordingly, this Court should enter judgment for the Town on the Plaintiffs' effective prohibition claim.

Argument:

A. The Plaintiffs' application to erect a single 120 foot PWSF is not the only feasible plan to satisfy Unicel's and U.S. Cellular's coverage objectives.

After the Plaintiffs commenced the present action, the Town hired Mr. David Maxson to provide independent expert advice. Mr. Maxson's report is attached as Exhibit 1 to this motion. It is Mr. Maxson's opinion that "the Board's decision not to approve the proposed Tower at the Site does not preclude other reasonable means to substantially satisfy Unicel's and U.S. Cellular's coverage objectives in the area of Alton that is the subject of this case." (Exhibit 1 at ¶16). Mr. Maxson goes on to state, "[w]ith such likely alternatives, it is my opinion

that the Town's decision does not prohibit the provision of personal wireless services in Alton, regardless of the true extent of a gap in their services, if any, within Alton." (Exhibit 1 ¶16).

ICE's own application to the Town is the first piece of evidence that a 120 foot tall tower is not the only feasible solution. (R. 37). In its application to the Town, ICE states that the "proposed Monopole will structurally accommodate at least five (5) wireless service providers for service in the Town." (R. at 39). As Mr. Maxson stated in his report, "[t]his means that ICE anticipated the Tower would accommodate wireless service providers occupying the customary ten-foot apertures at elevations above ground between 120 feet and 70 feet." (Exhibit 1 ¶17). Indeed, ICE represented to the Town future antennas on the monopole could be mounted at 90 feet and 80 feet. (R. 39). In other words, ICE concedes a shorter tower, a tower of 80 or 90 feet, closer to the tree canopy height and less intrusive on the viewshed but capable of only holding one antenna, is feasible for closing the alleged gap. The Town's legislative choice of more, shorter towers is protected by the TCA:

> Ultimately, we are in the realm of trade-offs: On one side are the opportunity for the carrier to save costs, pay more to the town and reduce the number of towers; on the other are more costs, more towers, but possibly less offensive sites and somewhat shorter towers. [Plaintiffs] may believe that even from an aesthetic standpoint

> [their] solution is best. But subject to outer limit, such choices are just what Congress has reserved to the town.

Town of Amherst, N.H. v. Omnipoint Communications, 173 F.3d at 15, (citation omitted).

A shorter tower, though feasible for coverage purposes, is not palatable to ICE because it has less capacity for antennas and is therefore less profitable. As the Town stated when it denied the application for rehearing, ICE "wants a tower of 120'. . . to maximize profit made from the tower." (R. 2222). ICE's unyielding economic desire to maximize profits is the only reason why a tower of 120 feet is required. A tower designed to hold "at least" five antennas is not the only feasible solution for closing the alleged gap in coverage.

Further evidence that ICE's profit motive, not the alleged service gap, is the driving force for a 120 foot tower is found in Attorney Duval's letter of 17 January 2006 to U.S. Cellular and Unicel which was provided to the Town in discovery (Exhibit 2). Attorney Duval, ICE's former counsel, reviewed the Ordinance's requirement that towers shall extend no more than 10 feet above average tree canopy. He concluded that "this Revised Ordinance would cut your proposed 120-foot tower, with room for several other carriers, to an 85-foot tower with room for one carrier at the lowest height possible." (Exhibit 2 at 2). Attorney Duval's conclusion is important because it acknowledges

that a one carrier tower at this location need not be higher than 85 feet and that the Ordinance requires towers to be at the "lowest height possible." The next sentence in this paragraph states that "[y]ou would have to build a new tower for each carrier and go through the entire site plan review process with the Planning Board, which is led (and perhaps manipulated) by Kathy Menici.[6] Undoubtedly, your profit margins would suffer as a result." (Exhibit 2 at 2; emphasis added).

In sum, Plaintiffs' real objection to shorter, single carrier towers is that they cost more money. They cost money to build and they cost money to permit. "Towers are very expensive, often costing $500,000 or so each; co-location increases tower height but reduces the number of towers and greatly reduces overall costs because fewer towers are needed and because a tower's cost does not increase proportionately with height." Town of Amherst, N.H. v. Omnipoint Communications Enterprises Inc., 173 F.3d at 11. The Amherst Court likewise noted that "detailed site planning is quite expensive, leases or options take time to procure, and even one set of variance and special exception requests is costly and time consuming. This one proposal strategy may have been a sound business gamble, but

[6] Kathy Menici was the Town's planner. The connotation of unwarranted hostility by Ms. Menici against ICE is not born out by the record. Not only did the Town approve ICE's application for 120 foot tower on Robert's Knoll site but Ms. Menici had left her position as Town planner in the summer of 2006, months prior to any decision on ICE's application.

it does not prove that the town has in effect banned personal wireless communications." Id. at 15.

The reasoning of the Amherst Court applies here and should be followed by this Court. ICE made a business decision to seek one large tower so that it can avoid the construction and site plan costs of multiple shorter towers. This Court, like the Amherst Court, should reject ICE's attempt to shoehorn its economic objectives into a TCA violation. Indeed, even Attorney Duval advised that such a tactic was not supported by the law. "Even the TCA may be of no avail against this Revised Ordinance. Case law has said time and time again that it is the discretion of the community to choose whether it wants taller but fewer towers or shorter but more numerous towers." (Exhibit 2 at 2).

B. The Plaintiffs' objections to smaller towers are without merit.

In his report, Mr. Maxson also reviewed ICE's objections to shorter towers. He rejected ICE's objections to lower towers because these objections were based upon inconsistent evidence, were not based upon testing, arose from invalid presumptions, or ignore simple solutions to correct technological objections. Each of these reasons will be addressed below.

ICE's objection to shorter towers, as Mr. Maxson notes, "relies on generalizations about the impact of trees on wireless coverage." (Exhibit 1 ¶18). Indeed, the Plaintiffs' claim that

"testing" showed that 120 feet was mandatory is not supported by the record because, as Mr. Maxson states, no testing was done at the site. (Exhibit 1 ¶18). "In the present case, no one conducted any site-specific engineering work to determine whether utilizing antenna height required under the Ordinance at the Site would have indeed been fatal to the attempt to provide wireless service from the Site." (Exhibit 1 ¶21). Mr. Maxson further explained that a "test antenna erected at the Site could have been employed to determine the degree of coverage 'shrinkage,' if any, that reducing the antenna heights to the Town's preferred height would have caused. Without such analysis, it remains just speculation on the part of all participants that the 10-feet-above-the-average-tree-height requirement would not work." (Exhibit 1 ¶21, emphasis added).

Not only did the Applicants fail to conduct tests to support their assertion, but of equal importance, Mr. Maxson's computer model shows that a tower of 71 feet closes the alleged gap in coverage. "My analysis of the 71-foot height . . . and the 120-foot height at the Site . . . reveal little difference in local coverage." (Exhibit 1 ¶18). Mr. Maxson then adds: "My plots show that at both heights, the coverage is generally as the other parties suggest it would be, but there is on my plot a depression in coverage to the south of the Site, primarily along Route 28A that is generally missed by the other analyses

submitted to the record. This is yet another reason why, if the Site continues to be pursued for a facility at any height, field measurements, taken in the form of a drive test of the Site, are imperative." (Exhibit 1 ¶25).

Mr. Maxson also disagrees with the Applicants' untested conclusion that the three trees which may be in line with antennas at a lower height will necessarily degrade performance. (Exhibit 1 ¶20). "Small projections of tree growth in the path of a signal do not necessarily obstruct the signal in a manner fatal to the signal coverage objectives." (Exhibit 1 ¶19). Mr. Maxson explains these taller trees are a good distant from the tower and therefore their peaks do not present a significant interference. "According to the Alton ICE 1 Tree Survey plot in the same submission, these tallest trees are between 75 and 100+ feet away from the tower position. Thus, not only is the narrow peak of each tree presented to the antennas, but also the trees are a substantial distance from the antennas, reducing their angular cross section to the signal path." (Exhibit 1 ¶20).

Mr. Maxson concludes, "it is my opinion that there is nothing unreasonable about the Town pursuing the 10-foot clearance criterion, or at most, considering making a minor exception to the 10-foot clearance if real data were submitted to support exceeding the 71-foot height by no more than five to ten feet." (Exhibit 1 ¶26).

Mr. Maxson also debunks the Plaintiffs' assertion that horizontal co-location will not work for this site. "The applicants dismiss the horizontal co-location for incorrect reasons." (Exhibit 1 ¶27). First, Unicel presents the worse case scenario of antennas pointing directly at each other. Mr. Maxson states, "[t]he worst case is rarely achieved, especially with careful planning and site design." (Exhibit 1 ¶27). Mr. Maxson also dismisses Unicel's claim that horizontal co-location requires towers 30 miles apart as "leaning toward hyperbole." (Exhibit 1 ¶27). "With wireless facilities every ¼ to 5 miles in a region, this threshold must be exceeded repeatedly across the country." (Exhibit 1 ¶27). Mr. Maxson's final criticism is that the Applicants overlook available technology, radio frequency filters, to minimize or eliminate problems arising from horizontal co-location. "Filters are routinely employed in communication facilities to control unwanted emissions and signals that are not in the frequency band of the desired signal." Mr. Maxson further opines that adding "filters to the system design, which is lacking in the Unicel analysis, one can readily filter the additional 23dB or so of unwanted energy, from another facility, assuming the worst case that antennas of the same frequency band (e.g. PCS) are pointed directly at each other." (Exhibit 1 ¶27).

Mr. Maxson also states that there is nothing "sacrosanct" about this site, even though it is owned by ICE, for locating additional poles. Mr. Maxson rejects the Plaintiffs' assertion "that there should be a single facility to 'cover' or 'fill' the purported gap in coverage." (Exhibit 1 ¶28). Mr. Maxson goes onto state, "[w]ith the Ordinance preference for these low-height, low-profile facilities, it may be more productive for the carriers to identify less prominent sites along the roadways and developed areas to place such installations. Being only 60 to 90 feet tall, depending on the surrounding growth, these installations could simply be mounted on wooden utility poles." (Exhibit 1 ¶28). Mr. Maxson shows in Exhibit 4 to his affidavit how this could be done. "I have positioned three 70-foot poles around the targeted area to achieve substantially the same coverage area as the hilltop Tower." (Exhibit 1 ¶28).

Mr. Maxson ends his analysis by stating his opinion that "there are plenty of other means that the carriers Unicel and U.S. Cellular could propose that better meet the intent of the Alton Ordinance and have a less objectionable impact on the community." (Exhibit 1 ¶32). He concludes "the denial of permission by the Town for ICE to construct its proposed 120-foot Tower at the Site is not inherently prohibitive of the provision of wireless service." (Exhibit 1 ¶32).

Conclusion:

This Court should enter judgment for the Town of Alton. The ZBA's denial of an area variance to ICE to erect 120 foot PWSF on its 28.4 acre East Side Drive property, which is located in the Town's Lakeshore Residential zoning district, did not violate the TCA. The Town approved ICE's application for 120 foot tower for the Robert's Knoll site and, therefore, Alton has not imposed a blanket ban on PWSFs. Furthermore, the evidence is that feasible alternatives exist to ICE's proposal of a large, multi-carrier tower to close this allege gap in coverage. The evidence from the Town's expert, Mr. Maxson and in ICE's own application is that shorter, single carrier towers are a feasible alternative. ICE, as the owner of this property, is motivated to maximize its profits from this parcel. While constructing a large, single tower which can hold numerous antennas, with each antenna owner paying rent, achieves ICE's corporate goal, the rejection of such a tower does not make for a violation of the TCA.

Respectfully submitted,
TOWN OF ALTON, NEW HAMPSHIRE
By its attorneys,

DATED: May 19, 2008

/S/ Robert M. Derosier
Robert M. Derosier, NHB No. 9979
Robert D. Ciandella, NHB No. 2817
DONAHUE, TUCKER & CIANDELLA, PLLC
225 Water Street
Exeter, NH 03833
(603) 778-0686

CERTIFICATE OF SERVICE

I hereby certify that on 19 May 2008, a true copy of the above document will be sent to counsel of record via the Court's Electronic Case Filing system.

/S/Robert M. Derosier
Robert M. Derosier, NHB No. 9979
Robert D. Ciandella, NHB No. 2817
DONAHUE, TUCKER & CIANDELLA, PLLC

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EXHIBIT 1

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Industrial Communications and Electronics, Inc.; RCC Atlantic, Inc. d/b/a Unicel; and U.S.C.O.C. of New Hampshire RSA #2, Inc. d/b/a U.S. Cellular, Plaintiffs vs. The Town of Alton, New Hampshire Defendant	Case No. 1:07-cv-82-PB

EXPERT REPORT OF DAVID MAXSON
PURSUANT TO FED.R.CIV.P. 26(a)(2)(B)

I, David P. Maxson, hereby say that the following is true based on my personal knowledge and experience.

1. I am an adult citizen of the United States. I co-founded the radio frequency engineering firm Broadcast Signal Lab in 1982 and since then have been a Managing Partner and Principal Engineer. Broadcast Signal Lab has a principal place of business at 64 Richdale Avenue, Cambridge, Massachusetts, 02140. The firm provides engineering, design, construction, licensing and permitting services relating to radio communications facilities, including personal wireless services facilities. I have been engaged in this matter by the Defendants, The Town of Alton, New Hampshire ("Town"). Broadcast Signal Lab charges $205 per hour for my services, with a 20% surcharge for testimony, plus expenses.

2. I have extensive experience in matters relating to the placement of personal wireless service facilities, including the radio frequency engineering, site evaluation, and zoning and permitting of such facilities. Exhibit 1, attached hereto and incorporated by reference herein, contains my curriculum vitae, which includes a list of my publications. Exhibit 2, attached hereto and incorporated by reference herein contains a list of court cases on which I have worked as an expert, with those involving my testimony in court or at deposition highlighted.
3. I have been a member of the Town of Medfield, Massachusetts Wireless Committee since its inception in 1996. In that time, several wireless bylaw modifications have been adopted, a wireless tower constructed, and municipal leasing of the Town water tank to three wireless carriers has occurred, all as a result of the Committee's recommendations.
4. I have extensive experience in the field of radio frequency engineering, including designing, installing, maintaining, and upgrading radio frequency transmission and reception facilities, performing signal coverage and interference analysis, and preparing radio frequency allocations engineering, which involves identifying radio frequencies and transmitted power levels that prospective radio communications facilities can utilize without causing interference in the radio spectrum. I also have been responsible for filing engineering statements with the Federal Communications Commission ("FCC") in support of license applications for those facilities. I also have designed and implemented programs and procedures to ensure that radio frequency facilities are in compliance with technical regulations and standards, and performed field measurements and analysis of radio frequency signals.

5. From 1988 to 1995, I provided services as a radio frequency engineering consultant to the New England operations of the licensed personal wireless service provider, Cellular One. Among the other numerous private, municipal and corporate clients I have served, I have also provided radio frequency engineering services to developers of personal wireless facility sites and towers. Since 1993, I have been engaged by municipalities to advise them regarding the placement, construction and maintenance of personal wireless service facilities. I am currently under contract with the Cape Cod Commission and several Massachusetts municipalities to assist with their local zoning review of proposed personal wireless facilities. In the past decade I have performed over one hundred such consultations with municipalities in five of the six New England states, including Rhode Island, plus New York and Pennsylvania.
6. I have testified as an expert witness in both federal and state court cases on matters of wireless communications facilities siting, including testimony in Omnipoint Communications v. the Town of Lincoln, Massachusetts, AT&T Wireless PCS, LLC v. the Town of Concord, Massachusetts, and SBA Tower v. the Town of Kingston, NH, among others.
7. The Commonwealth of Massachusetts Office of Business and Consumer Affairs has qualified me as a wireless mediator and engineering expert to assist parties seeking the Office's assistance in resolving disputes regarding the location of wireless facilities and other issues.
8. I am my company's delegate to the DAS (distributed antenna system) Forum, an organization sponsored by the PCIA, which is the wireless infrastructure industry association. Active members of the DAS Forum include the wireless companies

Sprint and T-Mobile (also known in the USA as Omnipoint) as well as numerous system developers and product and service providers supporting DAS. At the fall 2007 PCIA Conference I was an invited panelist on two discussion panels relating to DAS networks.

9. In reviewing applications for permits for wireless facilities tendered by personal wireless service providers to governmental entities, I employ my knowledge of the science of radio frequency signal propagation and communication, my knowledge of radio communications facility design and construction methods, and my familiarity with the manner in which radio communications facilities must adhere to applicable requirements, such as land use regulation and building codes. My analysis employs methods and practices that are commonly employed by experts in the field, and/or based on common knowledge in the field, and/or rely on standardized methods adopted by open, consensus-based standardization bodies.
10. I am familiar with portions of the Federal Telecommunications Act of 1996 ("TCA") and have advised governmental entities, wireless communications companies, and other parties regarding compliance with numerous provisions of the statute and its subsequent implementations by the FCC.
11. I am familiar with FCC rules regarding personal wireless services under which FCC-licensed personal wireless service providers are licensed to operate.
12. I am aware that the TCA does not preempt local zoning as long as the local zoning does not prohibit or have the effect of prohibiting the provision of personal wireless services, does not unreasonably discriminate among providers of functionally equivalent services, and does not regulate placement of personal wireless facilities on

the basis of environmental effects of the radio frequency emissions to the extent that they comply with FCC emissions regulations.

13. I have assisted numerous municipalities in the drafting of bylaws and ordinances that enable compliance with TCA requirements and in the review of proposed facilities subsequently regulated under such bylaws and ordinances.

14. I have assisted numerous municipalities in the execution of requests for proposals to site wireless facilities on municipal property and am thereby involved in bid review and lease negotiations with wireless carriers.

15. In the matter of the instant case, I have reviewed numerous documents relevant to the case and supplied to me by the Town of Alton ("Town"). These documents include submissions to the Town by the applicants Industrial Communications and Electronics ("ICE"), RCC ("Unicel"), and U.S.C.O.C. ("US Cellular," and collectively, "Applicants") and by the consulting engineer hired by the Town, Mr. Mark Hutchins. I have also reviewed the Complaint of the Applicants as the plaintiffs in this matter ("Complaint"), as well as relevant portions of the Alton Zoning Ordinance ("Ordinance"). I have also relied on my map and propagation modeling sources, including ComStudy 2.2 by RadioSoft equipped with USGS digital elevation model of the terrain, USGS topographic maps, Google Earth aerial imagery, and on my familiarity with the area of Alton from recent work in the nearby Towns of Tuftonboro and Wolfeboro.

16. Based upon my review of the above documents, my technical analysis of the circumstances, and my technical knowledge and experience, it is my opinion that the Board's decision not to approve the proposed Tower at the Site does not preclude

other reasonable means to substantially satisfy Unicel's and US Cellular's coverage objectives in the area of Alton that is the subject of this case. With such likely alternatives, it is my opinion that the Town's decision does not prohibit the provision of personal wireless services in Alton, regardless of the true extent of a gap in their services, if any, within Alton. The reasons for this opinion are explained below.

17. ICE proposes a 120-foot tall wireless tower ("Tower") on a prominent hilltop at the 486 East Side Drive address in Alton, New Hampshire ("Site"). In its presentations ICE asserts that the Tower "would be able to accommodate up to five wireless providers for co-location." (See, e.g., slide 10 of the presentation to the Town's joint board hearing September 12, 2006, submitted in hard copy September 19 and the Statement in Support of Application for Use and Area Variance dated September 6, 2005, p.3.) This means that ICE anticipated the Tower would accommodate wireless service providers occupying the customary ten-foot apertures at elevations above ground between 120 feet and 70 feet.

18. In order to defend the request for a 120-foot Tower above a 61-foot average tree height, in light of the Ordinance's requirement that such structures not exceed ten feet above the average tree height, the Applicants backpedaled from the initial assertion regarding supporting five co-locators, submitting conflicting information about coverage from lesser heights. Much of this information relies on generalizations about the impact of trees on wireless coverage. In its "Statement in Support of Application for Use and Area Variance," dated September 6, 2005, the Applicants assert that, "according to the Affidavit from RCC's RF Engineer, testing at the proposed location has indicated that an antenna height of no less than 120 feet above

ground level is mandatory to satisfy the coverage objectives." (To my knowledge no "testing" was done at the site, but computer-estimations of coverage were produced at the office, which estimations are typically unable to resolve specific tree heights.) It goes on to suggest that a reduction in height would result in a "coverage shrinkage that would significantly limit the site's effectiveness..." In an undated document titled "Radio Frequency Analysis of the Evans Hill Alternative Location and Proposed Locations at Multiple Heights" ("Unicel Alternatives Report") provided by Unicel under the RCC logo, it states, "Below these height[s] [110 and 100 feet above ground] the surrounding vegetation will impede the signal and reduce the coverage in the Town of Alton." Then, Unicel's "Comments on the Town Tree Survey" submitted July 31, 2006, changes the analysis, stating, "For this location, RCC believes that heights below 92 feet AGL (5 feet above peak local clutter) will experience degraded performance." This erosion of minimum effective antenna height from 120 feet to 92 feet occurred as new information was provided in the hearing.

19. There could be more reduction in antenna height, possibly with the potential coverage "shrinkage" suggested by Unicel. In a letter to Mr. Hutchins and the Alton Boards submitted on the same date, the Applicants assert that there are taller-than-average height (for the location) white pine trees projecting into the space above the average tree height. The presumption is that either a tree is present in the signal path or it is absent. Tops of trees are much smaller in diameter and vegetative bulk than the wider lower portions. Small projections of tree growth in the path of a signal do not necessarily obstruct the signal in a manner fatal to the signal coverage objective.

While applying some margin (such as five or fifteen feet) above the "clutter" is a "rule of thumb" (according to a citation by Mr. Hutchins in para. 4a. of his Addendum to his technical report), it is only a rule of thumb. Mr. Hutchins refers to an engineering text speaking to the substantial attenuations that can be found with "low elevation angles [of propagation] through canopies of large, isolated trees..." However, the geometry of the few narrow tree peaks that might have to be penetrated or diffracted around do not constitute low elevation angles of propagation through large canopies. When transmitting from a hill, because the trees are on a slope, there may be only one treetop between the antenna and free space beyond, such that having the antenna below the peak level of one or two trees in a given signal path would not offer a significant obstruction to signal propagation.

20. Each of the three trees about which the Applicant expresses concern in the Applicants' Letter to Mr. Hutchins and Alton Boards submitted July 31, 2006 are said to be "directly in front of" one of the three antenna pointing directions ("sectors") from the tower, if it were reduced in height. According to the Alton ICE 1 Tree Survey plot in the same submission, these tallest trees are between 75 and 100+ feet away from the tower position. Thus, not only is the narrow peak of each tree presented to the antennas, but also the trees are a substantial distance from the antennas, reducing their angular cross section to the signal path.
21. Because of the vague generalizations about what will or will not significantly affect signals reaching Alton from the Town-preferred tower heights, there is little real evidence on the record to support varying the Ordinance. In the present case, no one conducted any site-specific engineering work to determine whether utilizing the

antenna height required under the Ordinance at the Site would have indeed been fatal to the attempt to provide wireless service from the Site. A test antenna erected at the Site could have been employed to determine the degree of coverage "shrinkage," if any, that reducing antenna heights to the Town's preferred height would have caused. Without such analysis, it remains just speculation on the part of all participants that the 10-feet-above-the-average-tree-height requirement would not work.

22. Even if it were determined that the geometry of the proposed Site favors a greater antenna height than that preferred by the Town in its Ordinance, Mr. Hutchins suggests that "a 25-foot reduction in the applied-for 120-foot height results in structures that, in my opinion, better lend themselves to stealth (tree) design..." This could keep the proposed tower short enough that tree camouflage will not, so to speak, stick out like a sore thumb, thereby potentially addressing the Town's concerns about the visual blight of the proposed 120-foot Tower. Mr. Hutchins makes an example of a 90-foot monopole with branches that he has seen in Vermont. The Town rejected a 120-foot Tower proposal at the Site.

23. Mr. Hutchins felt that "a 75-foot center-line height is reasonable," which only slightly exceeds the 71-foot maximum height calculated by the Ordinance based on the surrounding tree heights. Allowing for an additional few feet of antenna height above the center line, and the overall height would be about 78 feet based on this suggestion.

24. The tree-growth problem alluded to by the Applicants (Letter to Mr. Hutchins and Alton Boards) is not significant. As trees grow, facilities can be adapted to maintain minimum visibility and provide optimum service. In my experience with leasing

wireless facility sites and reviewing leases submitted to public record, wireless service providers often lock in long term leases with their landlords, but reserve the right to terminate at least once every five years. They are willing to potentially bear the cost of moving off a tower or other site if the business warrants the move. Hence it is not unreasonable that a wireless service provider might, in a ten-year period, with a tree height increase of about 5 feet, wish to make his facility a little taller to maintain conformance with the Ordinance and to maintain its coverage.

25. My analysis of the 71-foot height (Exhibit 5 attached hereto and incorporated herein by reference) and the 120-foot height at the Site (Exhibit 6 attached hereto and incorporated herein by reference) reveal little difference in local coverage. My computer propagation model employs the Longley-Rice model published by the National Institute of Standards and Technology and requires some 400 calculations to derive each data point on the map. It is typically more computationally intensive and therefore able to discern more subtle impacts of terrain and land cover on the signals. My plots show that at both heights, the coverage is generally as the other parties suggest it would be, but there is on my plot a depression in coverage to the south of the Site, primarily along Route 28A that is generally missed by the other analyses submitted to the record. This is yet another reason why, if the Site continues to be pursued for a facility at any height, field measurements, taken in the form of a drive test of the Site, are imperative.

26. Based on the foregoing, it is my opinion that there is nothing unreasonable about the Town pursuing the 10-foot clearance criterion, or at most, considering making a

minor exception to the 10-foot clearance if real data were submitted to support exceeding the 71-foot height by no more than five or ten feet.

27. In its "horizontal co-location" policy, the ordinance encourages the use of a greater number of wireless facility structures in town in order to protect the unencumbered skylines, by keeping antenna arrays nearly invisible and close to the tree lines. The applicants dismiss the horizontal co-location for incorrect reasons. Unicel presents a "Comment and Response to CMA Engineers' Memorandum Dated October 3, 2006" under the RCC logo, in which a seemingly thorough analysis of isolation between radio systems is provided. It properly reviews the mathematical mechanism for computing antenna isolation, and suggests a reasonable isolation specification of 50 dB. It acknowledges that the worst-case is computed as an example, assuming two antennas are pointing directly at each other from two nearby antenna poles. The worst case is rarely achieved, especially with careful planning and site design. The presentation leans toward hyperbole when it suggests that antennas must be horizontally separated by 30 miles to achieve the same isolation that placing one set of antennas ten feet above another does. While mathematically this may be true, if its calculations are correct, it is a meaningless comparison. With wireless facilities every ¼ to 5 miles in a region, this threshold must be exceeded repeatedly across the country. More to the point, the worst case analysis suggests that it requires a 400-foot separation between two facilities aimed at each other to meet the preferred isolation threshold of 50 dB. This analysis incorrectly overlooks a most critical element of facility design—the radio frequency filter. Filters are routinely employed in communications facilities to control unwanted emissions and signals that are not in

the frequency band of the desired signal. Each cell site has the capability of filtering its own channels to reject unwanted energy from other facilities. Adding filtering to the system design, which is lacking in the Unicel analysis, one can readily filter the additional 23 dB or so of unwanted energy, from another facility, assuming the worst case that antennas of the same frequency band (e.g. PCS) are pointed directly at each other. Adding to the isolation, antennas on two separate poles are often not horizontally aligned (because their mounting poles may be at different elevations due to the height of the ground and the height of the trees at each position) and pointed at different bearings, and possibly down-tilted to focus on the targeted area better. I have personally observed working personal wireless facilities on dual towers within 75 feet of each other.

28. Even if there were no room for additional poles at the average tree height on the Site to support additional wireless carriers, there is nothing sacrosanct about the Site. The applicants rely on the idea that there should be a single facility to "cover" or "fill" the purported gap in coverage. Indeed, if there is not a perfectly situated hilltop to provide the desired coverage to the entire area designated as a "gap" in an Ordinance-compliant way, then the carriers are obliged to try another way. With the Ordinance preference for these low-height, low-profile facilities, it may be more productive for the carriers to identify less prominent sites along the roadways and developed areas to place such installations. Being only 60 to 90 feet tall, depending on the surrounding growth, these installations could simply be mounted on wooden utility poles. In Exhibit 3, attached hereto and incorporated by reference herein, I present a photograph of an exposed 80-foot tall utility pole installation for illustration. Such an

installation can be more carefully placed in heavily wooded Alton to minimize its visibility. In Exhibit 4, attached hereto and incorporated by reference herein, I have positioned three 70-foot poles around the targeted area to achieve substantially the same coverage area as the hilltop Tower.

29. The use of three locations for a wireless service provider instead of the one proposed is based on the trajectory of the wireless industry's expansion. Unicel, for instance, illustrates coverage with the lowest signal level, -95 dBm, which typically represents carriers' target levels for outdoor reliable service. As Mr. Hutchins explains in more detail in his report to the Town, carriers routinely seek levels in the stronger magnitude of about -84 dBm to provide what they consider to be reliable in-vehicle service, and levels between -82 dBm (for AT&T Wireless) and -76 dBm (for some other carriers) are considered strong enough to reliably penetrate residential or even commercial buildings. Therefore, any carrier currently designing his network for outdoor service is taking an expedient route to quick generalized coverage. As is regularly shown in other areas of New England, carriers return to install more facilities to improve vehicular penetration. Also, as Mr. Hutchins also mentions, carriers are now more interested than ever in providing reliable service right to the kitchen, so to speak, "the Town of Alton should be prepared to accommodate proposals for larger (taller) and/or more numerous facilities to enable in-building/in-home service." (Mr. Hutchins' first report) Since the Alton Ordinance does not favor larger, taller structures, the quantity of low-profile one- or two-carrier poles can be expected to increase over time to support the evolution of services to the residence. This may be particularly true in an area such as Alton where many people bring their

cell phones, Blackberries and laptop computers to their second residences where there may not be a permanent land line to support the communications services they desire.

30. One of the shortcomings of the placement of a tower on a prominent hilltop is that it is often a substantial distance from any areas of concentrated development or land use. The result of such placements is that the desirable in-building coverage falls on deaf ears, woods where there is little or no development. The proposed Site's in-building footprint misses the development along the surrounding roadways, while delivering its most robust signal to woods. By placing facilities nearer the major thoroughfares and places where people live, work, and play, the future of the wireless network is guaranteed to be one that provides robust in-vehicle and in-building service. The choice of the Site overlooks these subtleties that are strong incentives to town planners to develop wireless facility rules that will honor the integrity of the community for the long term.

31. There is considerable discussion in the record regarding the placement of dish antennas for inter-facility communications. While having line-of site from a facility to another is a convenience that can be exploited with the use of microwave links to carry the call traffic back to a central point, it is not a necessary component of most wireless facility designs. The licensed personal wireless services at issue in this case are the PCS services operated between the providers (Unicel and US Cellular) and their subscribers. The private, fixed wireless links that employ the dish antennas are not Commercial Mobile Radio Services and therefore are not applicable to the prohibition of service protections being sought under the Complaint. Wireless carriers commonly utilize land lines to carry their call traffic back to their switching

centers. The dishes and any heights necessary for obtaining clear microwave paths to other locations are not relevant to the case.

32. In my opinion, there are plenty of other means that the carriers Unicel and US Cellular could propose that better meet the intent of the Alton Ordinance and have a less objectionable impact on the community. Therefore, the denial of permission by the Town for ICE to construct its proposed 120-foot Tower at the Site is not inherently prohibitive of the provision of wireless service.

Dated: November 15, 2007

David Maxson

Exhibit 1
Curriculum Vitae of David Maxson
Including a List of Publications

David P. Maxson
Curriculum Vitae

History

Broadcast Signal Lab, LLP, Cambridge, Massachusetts, 1982-present.

Founder, managing partner

- Evaluation of radio frequency facilities for compliance with technical and regulatory standards
- Safety planning and evaluation of communications facilities
- Communications facility design and construction
- Spectrum monitoring services at NIST-traceable calibration lab
- Radio frequency interference remediation
- Municipal guidance in wireless planning and regulation

Charles River Broadcasting Company, Waltham, Massachusetts, 1978-1998.

Vice President, Director of Engineering and Technical Operations

- Leading commercial classical music broadcaster in the USA.

Affiliations and Accomplishments

- Delegate to the National Radio Systems Committee, Digital Audio Broadcasting Subcommittee, 1998-present.
- Qualified expert witness on wireless communications matters before federal and state courts.
- Testimony, US House of Representatives Commerce Committee Telecommunications Subcommittee in the matter of Low Power FM Broadcasting, February 2000.
- Wireless facility evaluation and planning consultant to the Cape Cod Commission as well as to dozens of municipalities in New England.
- Appointed member of Massachusetts Department of Public Health ad hoc committee on revisions to electromagnetic energy safety regulations, 1997.
- Senior Member, Institute of Electrical and Electronics Engineers
- Certified Broadcast Radio Engineer, Society of Broadcast Engineers
- FCC General Class Radiotelephone License with Marine Radar Endorsement
- Bachelor of Science, Broadcasting and Film, Boston University, 1977
- Massachusetts Licensed Construction Supervisor #CS073481

Publications

- Author, *The IBOC Handbook— Understanding HD Radio Technology*, 2007, Focal Press.
- Author, Chapter 2.5, *Managing Workplace and Environmental Hazards,* NAB Engineering Handbook, 10th Edition, 2007, Focal Press.
- Article, *Evaluating Emissions of Your New IBOC Transmitter*, Radio World Engineering Extra, June 2005.
- Article, *Posting Hazard Communications Signs at Your Radio Transmission Plant,* Radio Guide, April 2005.
- Published Paper: *Interference Potential of Hybrid Digital Transmission: An IBOC Occupied Bandwidth Case Study*, Proceedings of the National Association of Broadcasters Broadcast Engineering Conference ("NAB-BEC"), 2004.
- Published Paper: *Integrating ANSI-Compliant RF Signs Into Corporate RF Safety Programs*, NAB-BEC 2004.
- Published Paper, co-author: *Applying the Principles of Data Communications to the Development of an Open and Universal IBOC Data Protocol,* NAB-BEC 2003
- Published Paper: *How Data Will Be Managed on IBOC; Using a Gateway to Generate Data Revenue*, NAB-BEC 2002.
- Published Paper: *Receiver Study Conducted for Low Power FM Proponents; Similarities and Differences with Other Studies.* NAB-BEC 2000.

Exhibit 2
Listing of Court Cases on Which David Maxson Has Worked as an Expert.
Cases Involving Testimony Highlighted

Litigation in which David Maxson Participated
(Cases highlighted in blue involved his testimony in court or in deposition.)
(Cases are in approximate reverse chronological order.)

11/13/2007

Location	Code*	Case Number	Case Name	Year
Wolfeboro, NH	R	STATE OF NEW HAMPSHIRE CARROLL COUNTY SUPERIOR COURT Docket No. 06-C-0010.	Green Mountain Realty Corp., Plaintiff, v. The Fifth Estate Tower, LLC., et al, Defendant.	2007
Watertown, MA	R	UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS C.A. NO. 07- 10378 - RWZ	NEXTEL COMMUNICATIONS OF THE MID-ATLANTIC, INC. d/b/a NEXTEL COMMUNICATIONS, Plaintiff, v. THE TOWN OF WATERTOWN, MASSACHUSETTS, and THE ZONING BOARD OF APPEALS OF THE TOWN OF WATERTOWN, MASSACHUSETTS, et al, Defendants.	2007
Salisbury, MA	R	UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS C.A. No. 06-CV-12303-JLT	NEXTEL COMMUNICATIONS OF THE MID-ATLANTIC, INC. d/b/a NEXTEL COMMUNICATIONS, Plaintiff v. THE TOWN OF SALISBURY, MASSACHUSETTS, et al, Defendants.	2007
Newbury, MA		UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS Civil Action No. 07-CA-10477-PBS	OMNIPOINT COMMUNICATIONS, INC., A Wholly Owned Subsidiary of T-Mobile, USA, Inc., Plaintiff, v. TOWN OF NEWBURY, et al., Defendants.	2007
Dracut, MA	R	United States District Court District of Massachusetts 1:06-cv-11139-PBS	OMNIPOINT COMMUNICATIONS, INC., A Wholly Owned Subsidiary of T-Mobile, Inc., Plaintiff, v. THE TOWN OF DRACUT, TOWN OF DRACUT ZONING BOARD OF APPEAL, et al., Defendants.	2007
Cranston, RI	R	UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS C.A. NO. 06-531ML	OMNIPOINT HOLDINGS, INC., Plaintiff, v. THE CITY OF CRANSTON, THE ZONING BOARD OF REVIEW OF THE CITY OF CRANSTON et al, Defendants.	2007
Conway, NH	R	Docket No. 06-E-178 Docket No. 06-E-179 CDC File No.: 9722.008	Richard and Sarah Page Mayo v. Town of Conway Zoning Board of Adjustment Richard and Sarah Page Mayo v. Town of Conway Planning Board	2007
Westfield, MA	R,N,D	UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS C.A. NO. 05-30243-KPN	OMNIPOINT HOLDINGS, INC., a Division of T-MOBILE, Plaintiff, v. CITY OF WESTFIELD, WESTFIELD ZONING BOARD OF APPEALS, et al, Defendants.	2006
Lenox, MA	R,D	UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS C.A. NO. 05-CV-30131-MAP	NATIONAL GRID COMMUNICATIONS, INC., Plaintiff v. TOWN OF LENOX and LENOX ZONING BOARD OF APPEALS, Defendants	2006
Somerville, MA	N	COMMONWEALTH OF MASSACHUSETTS MIDDLESEX, SS SUPERIOR COURT Civil Action Docket No 03-2174	Manuel Kramer, Plaintiff, v. Philip Ercolini, et al., Defendant.	2006
Concord, NH	R	UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE	USCOC of New Hampshire RSA #2, Inc. d/b/a U.S. Cellular, Plaintiff, v. The City of Concord, New Hampshire, Defendant	2006
Woburn, MA	R	UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS C.A. NO. 03-12030 MEL	Omnipoint Holdings, Inc., Plaintiff, v. City of Woburn and Woburn City Council, Defendants.	2005
West Bath, ME	T	West Bath District Court Docket No. CR-05-332	State of Maine v. Nick Curit	2005
Wayland, MA	R	UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS C.A. No. 04-11807MLW	NEW CINGULAR WIRELESS PCS, LLC, f/k/a AT&T WIRELESS PCS, LLC, and HORIZON TOWERS, LLC, (substituted for Eastern Towers, LLC), Plaintiffs, v. TOWN OF WAYLAND, MASSACHUSETTS, BOARD OF APPEALS of the TOWN OF WAYLAND et al, Defendants.	2005

Kingston, MA	R	UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS C.A. NO. 02-12452-RCL	NT SHARED TOWER SITES, LLC, and OMNIPOINT HOLDINGS, INC., Plaintiffs, v. TOWN OF KINGSTON, MASSACHUSETTS, BOARD OF APPEALS of the TOWN OF KINGSTON, et al Defendants.	2005
Stoughton, MA	R	UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS C.A. NO. 03CV12517-MEL	MFC COMMUNICATIONS, INC. and OMNIPOINT HOLDINGS, INCORPORATED, Plaintiffs, v. THE TOWN OF STOUGHTON, THE TOWN OF STOUGHTON ZONING BOARD OF APPEALS, et al, Defendants.	2004
Coventry, RI	R	UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND C.A. NO. 03-113S	TOWER VENTURES, INC., Plaintiff v. THE TOWN OF COVENTRY and COVENTRY BOARD OF REVIEW, Defendants	2004
Westminster, MA	N	UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS C.A. NO. 02-40215 NMG	AT&T WIRELESS PCS, LLC, d/b/a AT&T WIRELESS, Plaintiff, v. TOWN OF WESTMINSTER, MASSACHUSETTS, ZONING BOARD OF APPEALS OF THE TOWN OF WESTMINSTER et al, Defendants.	2003
Grafton, MA	R,D	UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS C.A. NO. 02-CV-11600-RCL	CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS, Plaintiff, v. TOWN OF GRAFTON, MASSACHUSETTS, et al, Defendants.	2003
Carlisle, MA	D	UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS C.A. Nos. 02-10277 NG and 02-10285 NG UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS C.A.No. 02-11919 NG UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS C.A.No. 02-12081 NG	AT&T WIRELESS, SPRINT PCS, VERIZON WIRELESS and AMERICAN TOWER CORPORATION, Plaintiffs, v. TOWN OF CARLISLE, MASSACHUSETTS, ZONING BOARD OF APPEALS of the TOWN OF CARLISLE et al, Defendants. AMERICAN TOWERS, INC. and AMERICAN TOWER CORPORATION, Plaintiffs, v. WILLIAM R. WOODWARD, et al, Defendant. MATTHEW HAMOR, et al, Plaintiffs v. THE TOWN OF CARLISLE, et al, Defendant.	2003
Wayland, MA	R	UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS C.A. NO. 02-10260-REK	NEXTEL COMMUNICATION OF THE MID-ATLANTIC, INC. d/b/a NEXTEL COMMUNICATIONS, Plaintiff, v. THE TOWN OF WAYLAND, MASSACHUSETTS, THE ZONING BOARD OF APPEALS of the TOWN OF WAYLAND, MASSACHUSETTS et al, Defendants.	2002
Watertown, MA	R	UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS C.A. NO. 00CV 10516 RCL	SPRINT SPECTRUM L.P., Plaintiff, v. THE TOWN OF WATERTOWN, THE TOWN OF WATERTOWN BOARD OF APPEALS, et al, Defendants.	2002
Lanesborough, MA	R	UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS C.A. NO. 01-30205-MAP	TOWER VENTURES, INC., Plaintiff, v. TOWN OF LANESBOROUGH and LANESBOROUGH ZONING BOARD OF APPEALS, Defendants.	2002
Dartmouth, MA	N	United States District Court District of Massachusetts	Sprint Spectrum L.P. v. The Town of Dartmouth, et al.	2002
Boxborough, MA	R	UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS C.A. NO. 01-12019-WGY	OMNIPOINT HOLDINGS, INC., Plaintiff v. TOWN OF BOXBOROUGH and BOXBOROUGH BOARD OF APPEALS, Defendants	2002
West Springfield, MA	R	UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS C.A. NO. 00CV 30166 MAP	AT&T WIRELESS PCS, LLC, d/b/a AT&T WIRELESS SERVICES, Plaintiff, v. TOWN OF WEST SPRINGFIELD, MASSACHUSETTS, BOARD OF APPEALS OF THE TOWN OF WEST SPRINGFIELD et al, defendants.	2001

Wales, MA	N	UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS Civil Action No.: 01-10732-EFH UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS Civil Action No.: 01-40072-NMG	COMMONWEALTH NEW ENGLAND CORPORATION, Plaintiff, v. DAVID A DUPUIS, SUE ELLEN JOHNSON, KEVIN JEGELEWICZ and GENE RANDALL, as they are Members of the WALES PLANNING BOARD and not individually, Defendants. HIGH PEAK, INC., Plaintiff, v. THE TOWN OF WALES, MASSACHUSETTS, THE PLANNING BOARD OF THE TOWN OF WALES, MASSACHUSETTS, et al, Defendants.	2001
Lincoln, MA	R,T	UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS NO. 99-CV-110120-EFH	OMNIPOINT COMMUNICATIONS MB OPERATIONS, LLC, Plaintiff, v. TOWN OF LINCOLN, LINCOLN BOARD OF APPEALS et al, Defendants.	2001
Kingston, NH	R,D	UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE CASE NO.: C-00-535 JM	ATC REALTY, LLC AND SBA TOWERS, INC. V. TOWN OF KINGSTON, NH	2001
Dartmouth, MA	N	UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS CIVIL ACTION NO. 01-11633RWZ	CELLCO PARTNERSHIP d/b/a VERIZON WIRELESS, a Delaware General Partnership, Plaintiff, v. THE TOWN OF DARTMOUTH, MASSACHUSETTS, THE ZONING BOARD OF APPEALS OF THE TOWN OF DARTMOUTH, MASSACHUSETTS, et al, Defendants.	2001
Cummington, MA	R	UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS Civil Action No. 00CV12441GAO	AMERICAN TOWER CORPORATION and CARL B. LIEBENOW, Plaintiffs, v. ROBERT BERENSON, et al, Defendants	2001
Milton, MA	R,[DI]	UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS Civil Action No.: 00-CV-12480-DPW	AT&T Wireless Services, Inc., Plaintiff, v. Board of Appeals of the Town of Milton, et al., Defendants.	2000
Concord, MA	R,D	UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS Civil Action No. 99CV 11866 RWZ	AT&T WIRELESS PCS, INC. d/b/a AT&T WIRELESS SERVICES, Plaintiff, v. TOWN OF CONCORD, MASSACHUSETTS, BOARD OF APPEALS of the TOWN OF CONCORD, et al, Defendants.	2000
Kingston, MA	T, [P]		Massey & Company v. Cellular One and Liddell Brothers	
Dartmouth, MA	N		Dartmouth: Tower Ventures v. Town of Dartmouth	
Center for Constitutional Rights	R	Civil No. 3: 98CV375 (WWE) Civil No. 3:98CV529 (WWE)	PRAYZE FM a/k/a INCOM, L.L.C., MARK BLAKE, and LORETTA SPIVEY, Plaintiffs, - against - UNITED STATES OF AMERICA/FEDERAL COMMUNICATIONS COMMISSION, Defendant. UNITED STATES OF AMERICA/FEDERAL COMMUNICATIONS COMMISSION, Plaintiff, - against - PRAYZE FM a/k/a INCOM, L.L.C., and MARK BLAKE, Defendants.	
Canton, MA	R		Cellular One v. Town of Canton	
Aquinnah, MA	N	Cingular Litigation		

***CODE KEY**

All cases involved some form of consultation by David Maxson. In addition:
R = Expert report(s) prepared
N = Participated in negotiation process
D = Deposed
T = Gave testimony in court
All clients were the defendant, except:
[DI] = Client was defense intervenor
[P] = Client was plaintiff

Exhibit 3
80-ft Tall Utility Pole with Wireless Antennas

Exhibit 4
Coverage Plot of PCS Signal from Three Points around Target Area
at 70 feet height above ground- points marked "n"
(Yellow >-84 dBm Optimal Vehicular,
Green >-91 dBm Outdoor and Some Vehicular)

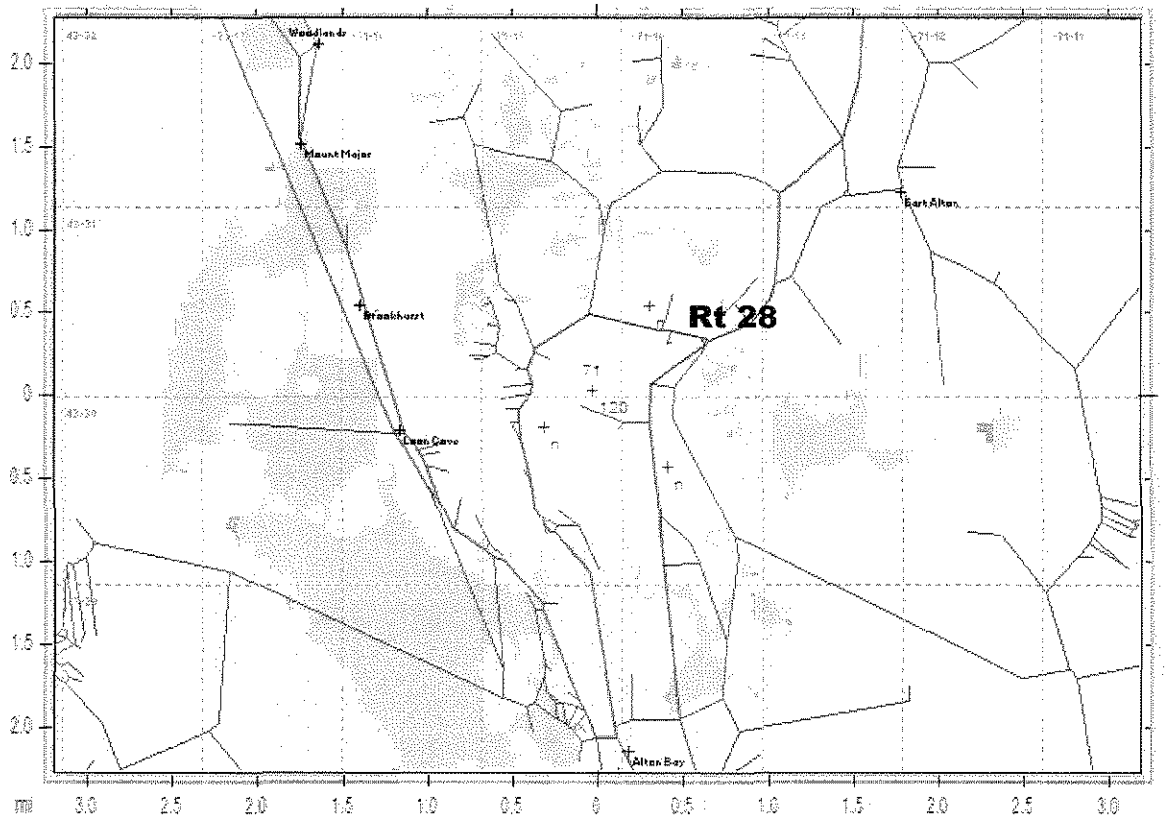

Exhibit 5
Coverage Plot of PCS Signal from Site
at 71 feet height above ground- point marked "71" and "120"
(Yellow >-84 dBm Optimal Vehicular,
Green >-91 dBm Outdoor and Some Vehicular)

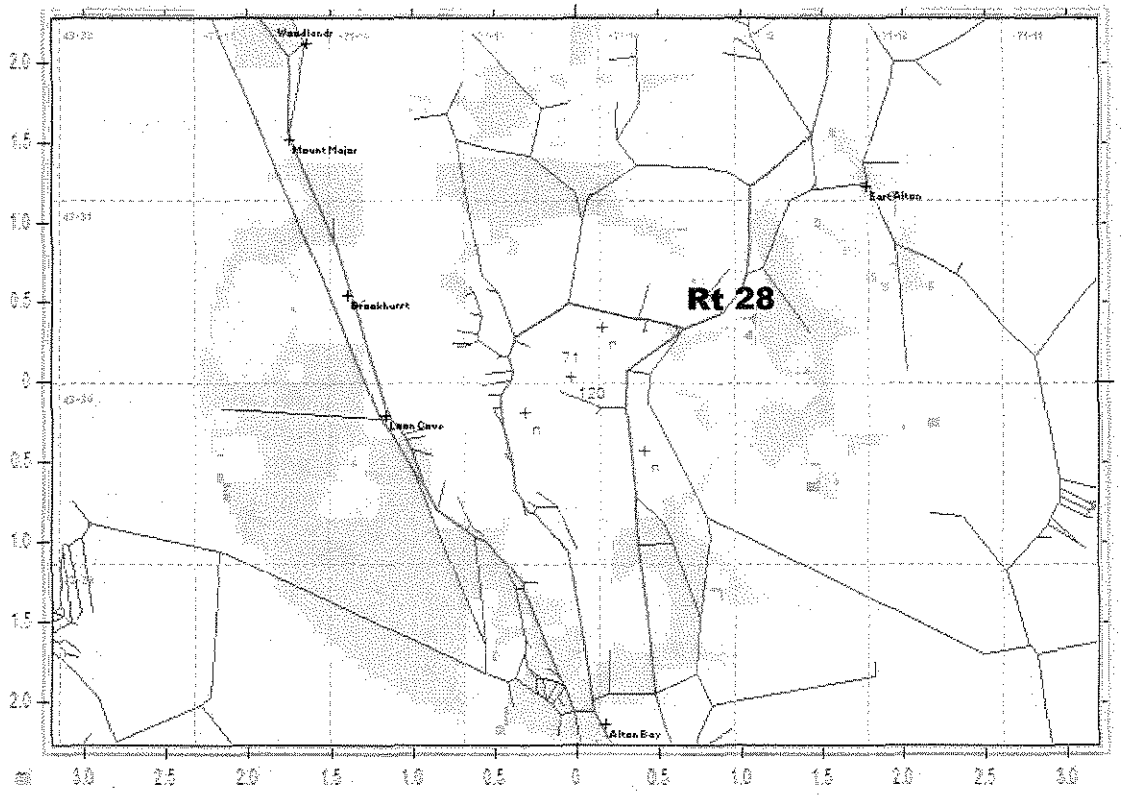

Exhibit 6
Coverage Plot of PCS Signal from Site
at 120 feet height above ground- point marked "71" and "120"
(Yellow >-84 dBm Optimal Vehicular,
Green >-91 dBm Outdoor and Some Vehicular)

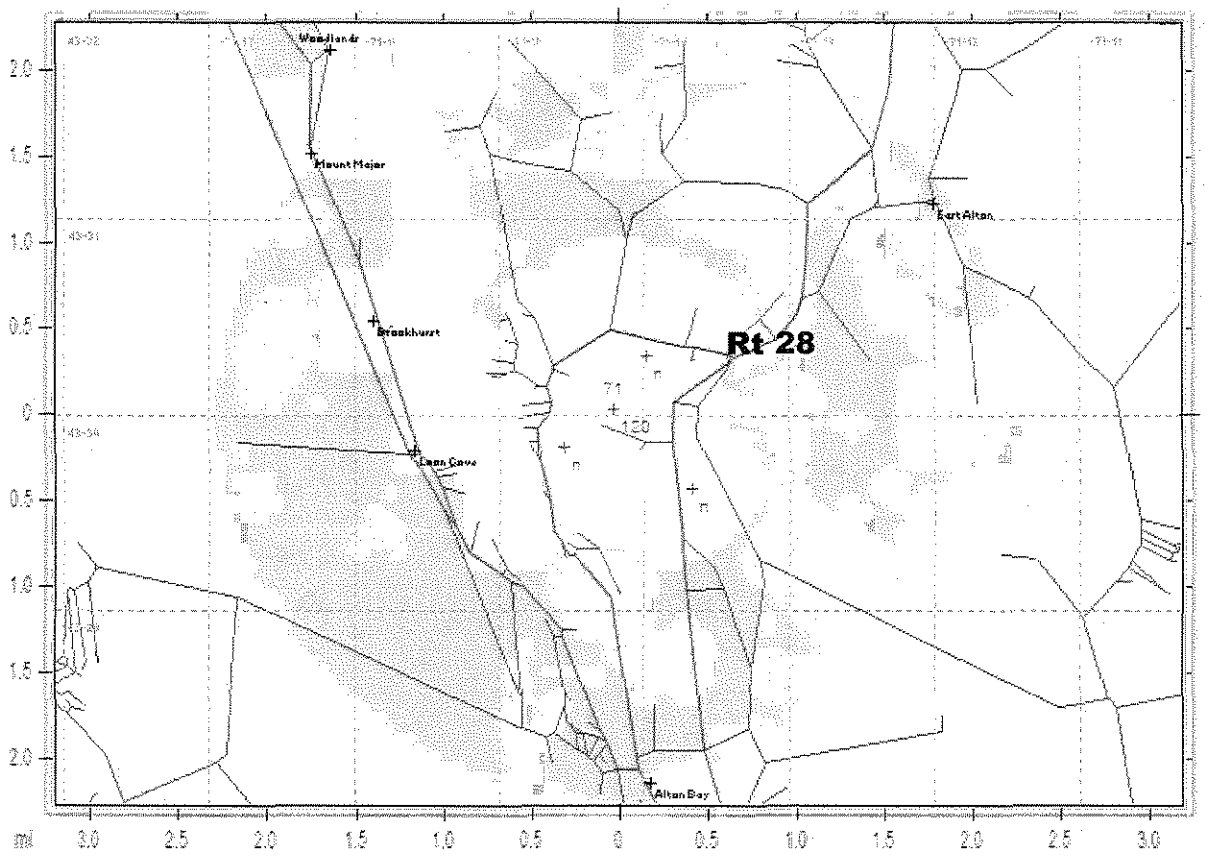

EXHIBIT 2

DUVAL & ASSOCIATES LLC
COUNSELORS AT LAW

OUR EXPERTISE. YOUR FUTURE. SUCCEEDING TOGETHER.®

Earl W. Duval
Licensed in Massachusetts and New Hampshire
earl.duval@duval-law.com

CONFIDENTIAL ATTORNEY-CLIENT CORRESPONDENCE

January 17, 2006

Via Email and Facsimile

Don Cody
Kevin Delaney
Industrial Communications & Electronics, Inc.
40 Lone Street
Marshfield, MA 02050

Re: Proposed Revised Telecommunications Ordinance, Town of Alton

Dear Don and Kevin:

As you are no doubt aware, on January 10, 2006, Alton Town Planner Kathy Menici faxed to our office a proposed Wireless Telecommunications Ordinance for the Town of Alton. This proposed Ordinance, if enacted by Town vote at Town Meeting, would supersede and replace the existing Section 270 of Alton's present Zoning Ordinance. This revision raises some important questions that must be addressed quickly:

Would Alton's Proposed Ordinance apply to our applications?

In New Hampshire, newly-adopted zoning ordinances apply to all property owners unless a landowner has relied in good faith on the absence of a zoning law and has made substantial construction on his property or has incurred substantial liabilities relating thereto. *AWL Power v. City of Rochester*, 148 N.H. 603, 606 (2002); see also *Thayer v. Town of Tilton*, 151 N.H. 483 (2004). In that case, the landowner would have a "vested" right in the prior ordinance.

The circumstances surrounding Industrial's applications do not present a compelling situation for vested rights. First and foremost, Industrial is not operating in the "absence" of any regulation, as is required by the aforementioned standard. Further, although substantial resources have been expended to date, no construction has begun or could begin until obtaining variances from the ZBA and site plan approval from the Planning Board. In light of the fact that Alton's town elections are being held on March 14, where the Revised Ordinance will probably be adopted, it is highly unlikely that we would begin construction before the effective date of the Revised Ordinance. Therefore, the Revised Ordinance, if passed, would be applicable.

Should we oppose the Revised Ordinance?

Although some aspects of the Revised Ordinance would be helpful to us, such as the allowance of wireless facilities in virtually all areas of the town, the remainder of it would derail our current projects. Under proposed section 603.6 ("Dimensional Requirements")

> [g]round mounted personal wireless service facilities shall not project higher than **ten (10) feet above the average tree canopy height** of the trees located within an area defined by a fifty (50) foot radius or perimeter of the mount, security barrier, or designated clear area for access to equipment, whichever is greatest.

Gentlemen, this Revised Ordinance would cut your proposed 120-foot tower, with room for several other carriers, to an 85-foot tower with room for one carrier at the lowest height possible. You would have to build a new tower for each new carrier and go through the entire site plan review process with the Planning Board, which is led (and perhaps manipulated) by Kathy Menici. Undoubtedly, your profit margins would suffer as a result.

If you wanted to install a tower that was more than 10 feet above the tree line, which includes adding on to an existing tower, you would have to obtain ZBA approval for an area variance. But this time, you would have to show that there were no feasible sites in the entire community that would close the coverage gap. I know that you performed a thorough investigation, but unless you can say with absolute certainty that there are no other sites available in the entire town of Alton, obtaining a variance may be quite difficult. All that would be needed to defeat the application would be one available property that could host a tower 10 feet above the tree line.

Even the TCA may be of no avail against this Revised Ordinance. Case law has said time and time again that it is the discretion of the community to choose whether it wants taller but fewer towers, or shorter but more numerous towers.

In light of the fact that this Revised Ordinance may be adverse to your interests, it may be advisable for us to oppose it as soon as possible. We should make the town aware that the Revised Ordinance would create "antenna farms" since each major carrier would require at least two or three towers to provide adequate coverage, and that co-location would be impossible. We should also point out that some provisions actually violate state law. We have found at least one section that is contrary to state statutes, and another that may violate the state constitution. Our opposition should be as widespread as possible, and we should seek out the Planning Board, Town Counsel, Town Administrator, Board of Selectmen, and perhaps even the local media.

If you desire to fight the Revised Ordinance, we will need further information about co-location, and specifically why carriers need to be spaced apart on towers a certain number of feet. It would also be helpful for our own purposes to have propagation maps for 85-foot towers at our proposed locations.

Should we proceed with the present applications or should we ask for a continuance?

Faced with the prospect that the law might change halfway through the application process, we have some immediate choices to make. We can either move full steam ahead on the applications and complete our presentations, or we can adopt a "wait and see" approach whereby we continue the hearings and wait to see if the Revised Ordinance is adopted.

One advantage to moving forward would be that we would keep the application process on track, especially since we cannot be certain that the Revised Ordinance will be adopted. Second, we would still need ZBA approval if you still want 120-foot towers. Another advantage would be that your rights under the TCA would be preserved. If we were to end up in litigation, we would assert that the town has unreasonably delayed us. However, this argument would backfire if we agreed to continuances or even requested them ourselves. One court found against a wireless provider who made the same argument, but who was very cooperative and permissive with the municipality with respect to continuances and delays. The court found the good intentions of the provider to be irrelevant.

The disadvantage to moving forward would be that some of our efforts may be wasted if the Revised Ordinance were passed. We would no longer need a use variance since wireless facilities are permitted in our proposed locations. If you decided that you could live with two 85-foot towers (assuming 10 feet above the average tree line), we would not even need an area variance for height, and we could skip the ZBA entirely. The biggest risk in moving forward, then, is the expenditure of time and money.

Conclusion

Please review these issues as soon as possible so we can decide what our next steps will be. Time is of the essence. There is a Planning Board meeting tonight, and our ZBA hearing is on January 23. I suggest a conference call ASAP to discuss.

Very truly yours,
Duval & Associates LLC

Earl W. Duval

By: Earl W. Duval
Attorney at Law